(202) 662-8330
(202) 393-4117 (FAX)

Thomas J. Henderson, *Deputy Director & Director of Litigation*

August 28, 2000

VIA EMAIL TRANSMISSION
Honorable Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M. Street, S.W.
Washington, D.C. 20460

Anne Goode, Director
Office of Civil Rights (1201A)
US Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: Comments on *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* and *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*

Dear Administrator Browner and Ms. Goode:

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and the N.A.A.C.P. Legal Defense & Educational Fund, Inc. ("LDF") submit the following comments on the Environmental Protection Agency's ("EPA") *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits* and the *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs* for your review and consideration.

The Lawyers' Committee is a national civil rights organization formed in 1963 to involve the private bar in assuring the rights of all Americans. For thirty seven years, the Lawyers' Committee has represented victims of discrimination in virtually all aspects of life. In 1992, the Lawyers' Committee formed its Environmental Justice Project to represent communities of color in environmental and civil rights matters. Our comments are drawn from the Lawyers' Committee's long and varied experience with the administration and application of the nation's civil rights laws, including within the environmental context.

LDF was incorporated in 1939 under the laws of New York State for the purpose of rendering legal aid free of charge to indigent "Negroes suffering injustices by reason of race or color." Its first Director-Counsel was Thurgood Marshall. The Supreme Court has recognized LDF's "corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation," *N.A.A.C.P. v. Button*, 371 U.S. 415, 422 (1963). LDF has participated as counsel in numerous environmental justice cases in state and federal courts and before administrative agencies, including cases involving siting of waste incinerators, highway construction and lead poisoning cases.

OVERVIEW OF COMMENTS

These comments briefly discuss the background of EPA's Title VI regulations and enforcement efforts, and of the development of the Proposed Guidance. The substance of the various aspects of the rather lengthy Guidance is then summarized. Finally, the comments discuss the substantive standards set forth in the Guidance, as well as important remedial and procedural standards and provisions.

The comments primarily are concerned with the question whether the Guidance conforms to established precedent, interpretations and applications of Title VI and analogous civil rights statutes. As well, the comments address concerns that are presented regarding the accessability of EPA's OCR and its investigative process to those most familiar with and affected by potential violations — communities of color across the nation — and the effectiveness of that process in accomplishing the Title VI compliance and enforcement function.

The Proposed Guidance departs substantially from the purpose, intent and meaning of Title VI. Specifically, the Guidance would impose limits on the application of Title VI that are not only contrary to the language and established interpretation of the statute, but that would sharply limit enforcement of civil rights protections by both EPA and, by extension, the recipients of EPA assistance. This is most notably the case in those portions of the Guidance that limit the "impacts" to be considered to those "within the authority of the recipients to consider" and the related limitations, both express and implied, on the universe of sources of impacts to be considered and the determination of those impacts that are "adverse". The Guidance, in its present form, seeks to limit Title VI essentially to a sub-species of environmental regulation. The Guidance would erroneously and substantially retrench on the civil rights protections Title VI was designed to afford and purposefully blind EPA to categories of discriminatory practices by recipients of federal funds. We strongly urge EPA OCR to correct these errors and issue Guidance that accurately reflects the scope and reach of Title VI.

I. BACKGROUND

On July 2, 1964, Congress enacted the Civil Rights Act of 1964, the most comprehensive civil rights legislation since Reconstruction.[1] Congress charged federal agencies with the duty to "demolish ... segregation and discrimination" which "experience has shown, can be dismantled only with the leadership and assistance of the Federal Government."[2] Title VI is specifically directed at eliminating the financial participation of the federal government in any programs involving racial or ethnic discrimination.[3] Title VI also requires federal agencies to promulgate regulations for its enforcement.

EPA promulgated implementing regulations under Title VI in 1973,[4] and revised its regulations in 1984. EPA nonetheless effectively avoided enforcement of Title VI until 1993 when the Clinton Administration increased attention on the issue of environmental justice.[5] Enforcement efforts thus far have been slow. Since 1993, EPA OCR has received 97 Title VI administrative complaints.[6] Of those 97 complaints, EPA Disparate has dismissed or rejected 47, leaving 50 currently pending. No complaint has resulted in a Title VI violation.

On February 11, 1994, President Clinton issued Executive Order No. 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. It orders that "each federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." In the Presidential memorandum accompanying the Order, President Clinton specifically emphasized that Title VI of the Civil Rights Act of 1964 provided opportunities for federal agencies to address environmental hazards in communities of color.

EPA responded to the Order by developing an Environmental Justice Strategy.[7] The Strategy states that "EPA will improve its implementation of requirements of Title VI of the Civil Rights Act

---

[1]42 U.S.C. § 2000 et seq. (1993).

[2]U.S. Commission on Civil Rights, Federal Civil Rights Commitments: *An Assessment of Enforcement Resources and Performance* (Nov. 1983); U.S. Commission on Civil Rights, Civil Rights Under Federal Programs: *An Analysis of Title VI of the Civil Rights Act of 1964* (1968).

[3]42 U.S.C. § 2000-d (1992).

[4]40 C.F.R. Part 7.

[5]U.S. Commission on Civil Rights, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs*, June 1996, p. 429 ("EPA's recent focus on environmental justice activities has increased the Agency's attention to Title VI issues.")

[6]EPA OCR, *Title VI Complaints Filed with EPA*, June 29, 2000.

[7]EPA OEJ, *Environmental Justice Strategy: Executive Order* 12898, EPA/200-R-95-002, April 1995.

of 1964 by issuing *guidance* and conducting oversight for state and local recipients of EPA funding."[8] Specifically, it states that "EPA will develop *guidance* on the requirements of Title VI for carrying out federally-authorized State permitting programs under the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act.[9] Pursuant to that commitment, EPA OCR developed the Guidance now proposed.

Immediately before issuing the Interim Guidance that preceded this Guidance, EPA made its first notable attempt at enforcing Title VI. That investigation was in response to a Title VI Administrative Complaint regarding the Louisiana Department of Environmental Quality's permitting of the proposed Shintech facility in St. James Parish, Louisiana. In August 1997, EPA OCR began an investigation at the site which was prematurely terminated by Shintech's withdrawal from the community. However, this investigation, which followed the Executive Order and EPA's Environmental Strategy and immediately preceded the Interim Guidance, lends some insight regarding EPA's original approach to Title VI.

During the investigation, EPA emphasized an important issue that is now absent from the Guidance. That is, the independent significance of Title VI compliance and enforcement in the environmental permitting context. Specifically, environmental laws generally treat many of the potentially harmful effects of pollution sources as "acceptable" when such sources are regulated under individual, facility-specific permits.[10] "Importantly, the presumption of the acceptability of residual pollution contemplated by permits did not consider that it would be distributed in such a way that it becomes concentrated in racial or ethnic communities.[11] Title VI and EPA's implementing regulations speak to that issue, by setting out an independent requirement that all recipients of EPA financial assistance ensure that they implement their environmental programs in a manner that does not have a discriminatory effect based on race, color, or national origin."[12]

While conducing the Shintech investigation, EPA issued its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*. Strong opposition, from both sides of the issue, immediately followed. But opposition from the states carried the most weight, leading to federal legislation prohibiting EPA from using any "funds 'to implement or administer the

---

[8]EPA OEJ, *Environmental Justice Strategy: Executive Order* 12898, EPA/200-R-95-002, April 1995, p.17.

[9]Id.(emphasis added)

[10]EPA OCR, Title VI Administrative Complaint re: *Louisiana Department of Environmental Quality/ Permit for Proposed Shintech Facility, Draft Revised Demographic Information*, April 1998, p.1.

[11]EPA OCR, *Title VI Administrative Complaint re: Louisiana Department of Environmental Quality/ Permit for Proposed Shintech Facility, Draft Revised Demographic Information*, April 1998, p.1-2.

[12]Id.

interim guidance'" for complaints submitted after October 21, 1998.[13] It was under this political climate, which extended from February 1998 until June 2000, that the current Guidance was revised and issued.

In June 1998, both before the Revised Guidance was issued and during this heightened political pressure, EPA decided its first case under the Interim Guidance. The case arose out the Michigan Department of Environmental Quality's issuance of a permit to the Select Steel Corporation of America for a steel recycling mill in Genesee County, Michigan. Only four months after the complaint was filed, EPA dismissed the claim. EPA's decision in Select Steel was controversial both because of its political underpinnings and questionable reasoning.[14]

In the context of this Guidance, the political pressure and EPA's response to that pressure is concerning. Yet, in the context of Title VI, it could be irreparable. What EPA adopts in the forthcoming Final Guidance could greatly influence Title VI enforcement. Courts will defer to the agency's interpretation of its own regulation. *See, e.g., Thomas Jefferson University v. Shalala,* 512 U.S. 504 (1994); *Lyng v. Payne,* 476 U.S. 926, 929 (1986) (granting high degree of deference to agency's interpretations of their own regulations). This is troubling given the Guidance's limitations on Title VI. Limiting standards regarding the range of impacts, adversity, and less discriminatory alternatives could be devastating to Title VI enforcement. Recognition that the Guidance is not "enforceable by any party in litigation" does little to ease this concern.

II SUMMARY OF GUIDANCE

A. Recipient Guidance

This Guidance provides "a framework designed to improve ... existing programs or activities and reduce the likelihood or necessity for persons to file Title VI administrative complaints."[15] Although focusing primarily on this "framework," the Guidance discusses Title VI and EPA's implementing regulations as the source of authority prohibiting a recipient from "issu[ing] permits that are intentionally discriminatory or have a discriminatory effect based on race, color, or national origin."[16] It reminds recipients that "when EPA approves an application for EPA assistance and you

---

[13] *Appropriations Act for Departments of Veteran Affairs and Housing and Urban Development and Independent Agencies for Fiscal Year Ending September 30, 1999,* Pub.L.No. 105-276 (H.R.4194, 112 Stat. 2461, 105th Cong. Tit. III (1998).

[14] Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice,* 27 B.C.Env.Aff.L.Rev 631, 660-666 (2000)(discussing *Select Steel* decision and responses to that decision).

[15] Recipient Guidance p. 2.

[16] Recipient Guidance p. 3.

receive the EPA funds, you accept the obligation of your assurance to comply with EPA's Title VI implementing regulations."[17] Also, "EPA's Title VI implementing regulations require that recipients "submit an assurance with [an] application that [they] will comply with the requirements of EPA's Title VI implementing regulations."[18] Instead of further defining these obligations, the Guidance is dedicated to discussing "recommendations ... designed to identify and resolve circumstances that may lead to complaints being filed with EPA under Title VI."[19]

In discussing recommendations, the Guidance covers several areas, including staff training, public participation, adverse disparate impact analysis, demographic analyses, intergovernmental involvement, ADR, mitigation measures, and self-evaluation of Title VI activities.[20] The Guidance provides such recommendations only as suggestions, however, while making clear that recipients "are not required to adopt such activities or approaches."[21]

B. Investigation Guidance

This Guidance governs investigations of Title VI administrative complaints challenging environmental permits. It is "directed at the processing of discriminatory effects allegations"[22] resulting from the issuance of pollution control permits by recipients of EPA financial assistance.[23] The Guidance does not create any rights nor enforceable obligations, and is clearly described as "discretionary."[24] In fact, EPA explicitly reserves the right "to follow the guidance, or to act at variance with the guidance, based on its analysis of the specific facts presented."[25]

The Guidance explicitly states that "Title VI is inapplicable to EPA actions, including EPA's issuance of permits, because it only applies to the programs and activities of recipients of Federal

---

[17]Recipient Guidance p. 3.

[18]Recipient Guidance p. 3.

[19]Recipient Guidance p. 3.

[20]Recipient Guidance p. 8.

[21]Recipient Guidance p. 6.

[22]Investigation Guidance p. 52.

[23]Investigation Guidance p. 51.

[24]Investigation Guidance p. 54.

[25]Investigation Guidance p. 54.

financial assistance."[26] It characterizes an investigation of Title VI complaints as one that "should be viewed as OCR following up on information that alleges that EPA funds are being used inappropriately."[27] It also emphasizes that "the Title VI administrative process is not an adversarial one," and that "[i]t is important to note that EPA does not represent the complainants, but rather the interests of the Federal government, in ensuring nondiscrimination by its recipients."[28]

C. Resolving Complaints

The Guidance emphasizes informal resolution of Title VI complaints. Specifically, it states that "OCR is committed to pursuing informal resolution"[29] and explicitly "encourages pursuit of informal resolution from the beginning of the administrative process."[30] EPA also states that it may "provide support for efforts at informal resolution" at least "to the extent resources are available."[31]

OCR agrees to facilitate these resolutions. "OCR will discuss offers by recipients to reach informal resolution at any point during the administrative process before the formal finding."[32] In fact, "during the informal resolution process, the recipient may independently submit a plan to OCR ... without consulting with complainants or others."[33] In evaluating plans, "OCR may consult with complainants, although their consent is not necessary."[34]

Although OCR also encourages "recipients and complainants to try to resolve the issues between themselves,"[35] it takes the position that "denial of the permit at issue will not necessarily be an appropriate solution."[36] OCR states that a denial is inappropriate because "it will likely be a rare

---

[26]Investigation Guidance p. 56.

[27]Investigation Guidance p. 62.

[28]Investigation Guidance p. 62.

[29]Investigation Guidance p. 57.

[30]Investigation Guidance p. 67.

[31]Investigation Guidance p. 67.

[32]Investigation Guidance p. 67.

[33]Investigation Guidance p. 69.

[34]Investigation Guidance p. 69.

[35]Investigation Guidance p. 67.

[36]Investigation Guidance p. 68.

situation where the permit that triggered the complaint is the sole reason for the discriminatory effects."[37]

2. Investigative Procedures

"EPA, like other federal agencies, is responsible for investigating formal complaints concerning the administration of programs by recipients of financial assistance."[38] "However, EPA expects that [its investigation process] will often be substantially improved and expedited by information submitted by complainants and recipients."[39]

II Submitted Information

II Analyses/Studies

While encouraging submitted information to resolve investigations, OCR also states it "cannot defer to a recipient's own assessment that it has not violated Title VI or EPA's regulations or that EPA rely on an assertion that a Title VI program has been followed" due to its "responsibility to enforce Title VI."[40] Later, however, OCR describes its willingness to rely on a recipient's submitted analysis concluding that "no adverse disparate analysis exists ... in a finding that the recipient is in compliance with Title VI and EPA's regulations."[41] OCR does state that such reliance is conditioned upon the relevancy, completeness, accuracy and sufficient scope of the analyses, which will dictate the amount of "weight" it is due.[42] Yet, only if the analysis contains "significant deficiencies" will OCR refrain from relying on it.[43]

ii. Area Specific Agreements

The Guidance also encourages recipients to develop area-specific agreements through which recipients can identify geographic areas where adverse disparate impacts may exist and enter into agreements with affected residents and stakeholders to eliminate or reduce, to the extent required by

---

[37]Investigation Guidance p. 68.

[38]Investigation Guidance p. 70.

[39]Investigation Guidance p. 70.

[40]Investigation Guidance, p. 70-71.

[41]Investigation Guidance, p. 72.

[42]Investigation Guidance p. 72.

[43]Investigation Guidance, p. 72.

Title VI, adverse disparate impacts.[44] The agreement, if supported by underlying analyses and a pollution reduction plan, will foreclose present and future investigations into allegations related to any of the permitting actions covered by the agreement.[45]

Once an agreement is properly made, OCR will rely upon it instead of conducting a first-hand investigation into allegations. Specifically, when OCR receives the first complaint with allegations related to the agreement, it will rely on the agreement and "close its investigation into the allegation."[46] With respect to any subsequent complaints that "raise allegations regarding other permitting actions by the recipient that are covered by the same area-specific agreement," OCR will generally rely upon its earlier finding and dismiss the complaint.[47] Only if "circumstances had changed substantially" such that the agreement is no longer adequate or properly implemented will OCR "be likely to conduct a first-hand investigation into the allegations."[48]

3. Adverse Disparate Impact Analysis

a. Define Scope of Investigation

In defining the scope of an investigation, OCR expects to rely on (1) the complaint's allegations, (2) an understanding of the recipient's authorities, (3) the results of an evaluation of scientific information, and (4) relevant available data.[49] The complaint will generally define the scope of the investigation.[50] Specifically, a complaint's allegations will define the investigation's

---

[44]Investigation Guidance, p. 72 (the Guidance does not define what the standard "to eliminate or reduce, to the extent required by Title VI, adverse disparate impacts" means.)

[45]Investigation Guidance, p. 73 ("If OCR accepts a complaint for investigation involving allegations of adverse disparate impacts related to any of the permitting actions covered by an area-specific agreement, OCR expects, under certain circumstances, to review and give due weight to the agreement if it: is supported by underlying analyses that [are] sufficient; and will result in actual reductions over a reasonable time to the point of eliminating or reducing, to the extent required by Title VI, conditions that might result in a finding of non-compliance with EPA's Title VI regulations.").

[46]Investigation Guidance, p. 73.

[47]Investigation Guidance, p. 73.

[48]Investigation Guidance p. 73.

[49]Investigation Guidance p. 79.

[50]Investigation Guidance p. 53.

"geographic scope, sources of concern, pollutants or other stressors, and potentially affected populations."[51] OCR may supplement this information with "available data."[52]

i. Recipient's Authority

OCR will limit its investigations to include only those pollutants ("stressors") and impacts which are "*within the recipient's authority to consider*, as defined by applicable laws and regulations."[53] "Applicable laws and regulations" include "permit programs" or "broader, cross-cutting matters, such as state environmental policy acts."[54] What is appropriate to consider as part of the adverse disparate impact analysis is determined by whether the recipient has "some obligation or authority" regarding it.[55] "A recipient need not have exercised this authority for it to be deemed within the recipient's authority to consider." However, a recipient will not be found to be in violation of Title VI or EPA's implementing regulations unless the adverse disparate impacts that form the basis of the violation "result from sources of stressors, the stressors themselves, and/or impacts cognizable under the recipient's authority."[56]

ii. Universe of Sources

In considering the impacts relevant to an investigation, EPA will consider the "*relevant* universe of sources"[57] which may include "other relevant and/or nearby sources of *similar* stressors."[58] In addition, "the relevant universe of sources contributing to the potential adverse impacts could include, if appropriate, *background sources*."[59] Including background sources allows cumulative impacts of both regulated and unregulated sources to be considered in determining the cumulative level of potential adverse impacts.[60] Specifically, "assessing background sources of

---

[51]Investigation Guidance p. 80.

[52]Investigation Guidance p. 80.

[53]Investigation Guidance p. 79 (emphasis added).

[54]Investigation Guidance p. 79.

[55]Investigation Guidance p. 79.

[56]Investigation Guidance p. 79.

[57]Investigation Guidance p. 80 (emphasis added).

[58]Investigation Guidance p. 80 (emphasis added).

[59]Investigation Guidance p. 80 (emphasis added).

[60]Investigation Guidance p. 80.

stressors allegedly contributing to discriminatory effects may be required to understand whether an adverse impact exists."[61] Background sources, therefore, are only included in determining adversity. In determining whether a recipient is in violation of Title VI or EPA's implementing regulations, the agency will not include background sources. Instead, determinations about violations will only "account for the adverse disparate impacts resulting from sources of stressors, stressors, and/or impacts *cognizable under the recipient's authority*."[62]

b. Impact Assessment

An impact assessment determines whether a causal link exists between the alleged discriminatory act and the alleged adverse impacts.[63] This will consider whether the permitted facility is the source of the stressor linked to an exacerbation of alleged impacts, and whether a plausible mechanism and exposure route exists. In conducting this assessment, EPA expects to quantify potential impacts, using data on sources, stressors, and associated potential impacts. EPA admits, however, that data may not be available for many types of impacts.

Available data will be considered in a hierarchical fashion. The list of data, in descending order, is monitoring, modeling, known releases, potential releases, and existence of sources. The most reliable will be given the most weight.[64] OCR will consider data using several approaches to determine causation, including "direct links to impacts," "risk," "toxicity weighted emissions," and "concentration levels."[65] "Direct links to impacts" is evidence of causation between an adverse health or environmental effect and the source of a stressor. "Risk" is the "prediction of potentially significant exposures and risks resulting from stressors created by the permitted activities."[66] Toxicity-weighted emissions "sums the releases of multiple stressors that may be associated with significant risks, weighted by a relative measure of each's toxicity or potential to cause impacts."[67] Concentration levels considers chemical concentration estimates which are "compared to benchmarks of concern for each chemical separately."[68]

---

[61]Investigation Guidance p. 57.

[62]Investigation Guidance p. 79 (emphasis added).

[63]Investigation Guidance p. 82.

[64]Investigation Guidance p. 82.

[65]Investigation Guidance p. 82.

[66]Investigation Guidance p. 82.

[67]Investigation Guidance p. 84.

[68]Investigation Guidance p. 84.

c. Adverse Impact Decision

In determining whether a predicted impact is "significantly adverse" under Title VI, "OCR would first evaluate the risk or measure of impact compared to benchmarks for significance provided under any relevant environmental statute, EPA regulation, or EPA policy."[69] Environmental benchmarks, therefore, are the primary standards OCR will use to measure adversity. OCR does state, however, that "compliance with environmental law does not constitute *per se* compliance with Title VI."[70] That is, "in some cases, the relevant environmental laws may not identify regulatory levels for the risks of the alleged human health impact or may not address them for Title VI purposes."[71] "In such cases, OCR could consider whether any *scientific or technical* information indicates that those impacts should be recognized as adverse under Title VI."[72]

According to the Guidance, health based standards based on environmental laws are "presumptively protective" within the meaning of Title VI.[73] "EPA and the states have promulgated a wide series of regulations to implement public health protections" such as the National Ambient Air Quality Standards (NAAQS).[74] "By establishing an ambient, public health threshold, the primary NAAQS contemplate multiple source contributions and establish a protective limit on cumulative pollution levels that should ordinarily prevent an adverse air quality impact on public health."[75] Therefore, "if an investigation alleges air quality concerns regarding a pollutant regulated pursuant to a primary NAAQS, and where the area in question is attaining that standard, the air quality in the surrounding community will be considered *presumptively protective* and emissions of that pollutant should not be viewed as 'adverse' within the meaning of Title VI."[76] It may be possible to overcome

---

[69]Investigation Guidance p. 84.

[70]Investigation Guidance p. 85.

[71]Investigation Guidance p. 84; It is important to note that when an environmental benchmark was not available to measure adversity in a Title VI investigation, OCR assumed there was no adversity. *Select Steel Complaint*, EPA File No. 5R-98-R5, at 5 (Oct. 30, 1998)("No performance specifications for continuous emissions monitoring systems have been promulgated by EPA to monitor dioxins. Without a proven monitor, MDEQ was unable to impose a monitoring requirement on the source. Therefore, EPA finds no discriminatory effect.")

[72]Investigation Guidance p. 85 (emphasis added).

[73]Investigation Guidance p. 86.

[74]Investigation Guidance p. 86.

[75]Investigation Guidance p. 86. It is important to note that the "primary" NAAQS that OCR interprets as "presumptively protective" for Title VI purposes are designed to protect only "public health," while the "secondary" NAAQS are designed to protect "public welfare." 42 U.S.C. § 7409(b)(1)-(2).

[76]Investigation Guidance p. 86 (emphasis added).

the presumption if contributions of the criteria pollutant "not subject to the standard" under NAAQS (i.e. from non-air pathways) exceed a standard under another environmental law.[77]

d. Comparison Populations

In identifying an affected population, OCR will determine which population "suffers the adverse impacts of the stressors from assessed sources."[78] Affected populations may be identified "depending on the allegations and the facts in the case," the population's "likely risk or measure of impact above a threshold of adversity," or "the sources or pathways of the adverse impacts"affecting the population.[79]

OCR plans to use several approaches to identify affected populations. "Environmental factors or other conditions like wind direction, stream direction, or topography," the "location of a plume or pathway," and "proximity" may be used.[80] "OCR expects to use mathematical models, when possible, to estimate the location and size of the affected populations."[81] It is important to recognize that, depending upon these approaches, "the affected population may or may not include those people with residences in closest proximity to a source."[82]

In determining the race, color, or national origin of the affected population, "OCR intends to use available data and demographic analysis methods, such as currently available U.S. census information," using "the smallest geographic resolution feasible for the demographic data."[83] "In conducting a typical analysis to determine an affected population, OCR would likely generate data estimating the race, color, or national origin and density of populations within a certain proximity from a facility or within a geographic distribution pattern predicted by scientific models."[84]

In determining the comparison population, "OCR would consider the allegations and factors of each case, and would generally expect to draw relevant comparison populations from those who live within a reference area such as the recipient's jurisdiction, a political jurisdiction, or an area

---

[77]Investigation Guidance p. 86.

[78]Investigation Guidance p. 87.

[79]Investigation Guidance p. 87.

[80]Investigation Guidance p. 87.

[81]Investigation Guidance p. 87.

[82]Investigation Guidance p. 86.

[83]Investigation Guidance p. 88.

[84]Investigation Guidance p. 88.

defined by environmental criteria, such as an airshed or watershed."[85] Comparison populations may include the "general population" or the "non-affected population" for the reference area.[86]

A disparity analysis will use "comparisons both of the different prevalence of race, color, or national origin of the two populations, and of the level of adverse impacts experienced by each population."[87] Each disparity must be "significant" for a finding of disparate impact.

"Measures of demographic disparity ... would normally be statistically evaluated to determine whether the differences achieved statistical significance to at least 2 to 3 standard deviations."[88] Measures of disparity in adverse impacts may include such factors as whether "the level of adverse impact [is] a little or a lot above a threshold of significance."[89] "A finding of an adverse disparate impact is most likely to occur where significant disparity is clearly evident in multiple measures of both risk or measure of adverse impact, and demographic characteristics, although in some instances results may not be clear."[90] "For example, where credible measures are at least a factor of 2 times higher in the affected population, OCR would generally expect to find a disparate impact under Title VI."[91]

4. Determining Whether a Finding of Noncompliance is Warranted

In determining whether a recipient is in violation of the discriminatory effects standard in EPA's Title VI implementing regulations, "OCR would assess whether the impact is both adverse and borne disproportionately by a group of persons based on race, color, or national origin, and, if so, whether the impact is justified."[92] OCR reiterates here again that "while assessing background sources of stressors contributing to alleged discriminatory effects may be required to understand whether an adverse impact is created or exacerbated, in determining whether a recipient is in violation of Title VI or EPA's implementing regulations and the extent of any voluntary compliance measures, the

[85]Investigation Guidance p. 88.

[86]Investigation Guidance p. 88.

[87]Investigation Guidance p. 88.

[88]Investigation Guidance p. 90.

[89]Investigation Guidance p. 90.

[90]Investigation Guidance p. 90.

[91]Investigation Guidance p. 91.

[92]Investigation Guidance p. 91.

Agency expects to account for the adverse disparate impacts resulting from sources of stressors, the stressors themselves, and/or impacts *cognizable under the recipient's authority*."[93]

a. Justification

If noncompliance is found, "a recipient will have the opportunity to 'justify' the decision to issue the permit ... based on a substantial, legitimate justification."[94] That requires a showing that "the challenged activity is reasonably necessary to meet a goal that is legitimate, important, and integral to the recipient's institutional mission."[95] Acceptable justifications include "provision of public health or environmental benefits to the affected population" and "broader interests, such as economic development, if the benefits are delivered directly to the affected population."[96] Benefits of economic development will be evaluated based on "not only the recipient's perspective, but the views of the affected community."[97]

b. Less Discriminatory Alternatives

A justification can be rebutted if EPA determines a less discriminatory alternative exists. Alternatives will be considered that are "practicable and comparably effective." "Cost and technical feasibility" will be considered in its practicability assessment of alternatives.[98] "Practical mitigation measures associated with the permitting action could be considered as less discriminatory alternatives."[99]

c. Voluntary Compliance

If OCR makes a preliminary finding of a Title VI violation, it will attempt to negotiate "voluntary compliance" by the recipient. OCR again reiterates here that "denial or revocation of a permit is not necessarily an appropriate solution."[100] "OCR will likely recommend that the recipient

---

[93]Investigation Guidance p. 92 (emphasis added).

[94]Investigation Guidance p. 92.

[95]Investigation Guidance p. 92.

[96]Investigation Guidance p. 92.

[97]Investigation Guidance p. 93.

[98]Investigation Guidance p. 93.

[99]Investigation Guidance p. 94.

[100]Investigation Guidance p. 94.

focus on other permitted entities and other sources within their authority to eliminate or reduce, to the extent required by Title VI, the adverse disparate impacts of their programs or activities."[101]

5. Hearing/Appeal Process

"If compliance with EPA's Title VI regulations cannot be achieved by informal resolution or voluntary compliance, OCR must make a finding of noncompliance."[102] The recipient then would receive two opportunities to appeal. First, the recipient may appeal an adverse finding to an EPA administrative law judge and, if that appeal fails, then the recipient may appeal to the EPA Administrator. EPA enforcement consists of terminating funding, which requires that a written report must first be submitted to Congress.

COMMENTS

The following comments cover several important issues raised in the Guidance. These issues are discussed below in order of priority. Although we refer to "the Guidance" throughout our comments, our references apply to both the Investigation Guidance and the Recipient Guidance. As a result, we encourage EPA to consider and review our comments when revising both Guidance documents.

A. FEDERAL AID RECIPIENT'S OBLIGATIONS UNDER TITLE VI

Title VI of the Civil Rights Act of 1964 has governed the programs and activities of all federal aid recipients for nearly four decades. EPA promulgated Title VI implementing regulations in 1973 and revised them in 1984. All federal agencies' Title VI obligations were clarified and strengthened in 1976 when DOJ promulgated inter-agency coordinating regulations for Title VI enforcement.[103] Congress itself reinforced the broad and strong language of Title VI in 1987, when enacting the Civil Rights Restoration Act of 1987.[104]

A recipients' Title VI obligations are extensive. Title VI itself prohibits intentional discrimination based on race, color or national origin under any program or activity of a federal financial assistance recipient. EPA's Title VI regulations prohibit a federal financial assistance

---

[101] Investigation Guidance p. 94.

[102] Investigation Guidance p. 94.

[103] 28 CFR § 42.405 (1993)(requiring each agency to draft compliance regulations for recipients, maintain fully staffed national and local civil rights offices, collect and distribute public information about its Title VI program, and develop a Title VI enforcement plan.)

[104] Pub.L.No. 100-259, § 2(2), 102 Stat. 28 (1988).

recipient from administering any program or activity that has a discriminatory effect on a population based on race, color or national origin. Under its regulations, EPA specifically requires recipients to follow certain procedures when applying for EPA loans and grants,[105] and reserves the right to conduct compliance reviews of any program receiving assistance at any time.[106]

While recipients' Title VI obligations are extensive, the Guidance fails to mention them with any specificity. EPA is required to provide recipients with guidelines for proper compliance with Title VI, including Title VI's application to specific programs, methods of enforcement, prohibited program practices, and suggested remedial actions.[107] Instead of fulfilling this requirement, the Guidance sets up a framework designed only to react to potential complaints, rather than to promote overall compliance. Therefore, the Guidance should be amended to provide recipients with clear requirements for compliance under Title VI. At a minimum, the Guidance should require that recipients consider and document the demographic characteristics of affected populations as part of the permitting process.[108]

B. ADVERSE DISPARATE IMPACT ANALYSIS

We agree that the first step in assessing the validity of a Title VI complaint should be to analyze whether, in fact, an adverse disparate impact has occurred. In several ways, the Guidance's approach to this analysis is commendable. In particular, we are pleased that EPA intends to give attention to the cumulative impacts of multiple exposures, including a range of "background" sources, in its determination of adverse impact. Consideration of cumulative impacts, however, must also be included in determining whether a recipient violated Title VI, because determinations based simply on single exposures to single pollutants would be grossly inadequate. We are also encouraged that OCR has clearly stated that its task, in handling Title VI complaints, is to enforce civil rights law, not environmental law. This distinction is imperative to the proper execution of Title VI investigations.

---

[105] 40 C.F.R. 7.80(a)-(c)(Applications for federal funding from EPA must include: (1) an assurance that the applicant will comply with EPA's Title VI regulations; (2) notice of any lawsuit against the applicant alleging discrimination; (3) a description of pending applications for loans or grants from other agencies; (4) a list of all federal aid currently received by the applicant; (5) a description of any civil rights compliance reviews of the applicant conducted during the previous two years.)

[106] 40 C.F.R. 7.85(a)-(b)(Recipients must maintain records for the purpose of compliance reviews, including (1) records of pending lawsuits alleging discrimination; (2) records of racial, ethnic, national origin, sex, and handicap data; (3) a list of filed discrimination complaints and the investigation of these complaints; (4) reports of compliance reviews conducted by other agencies; and (5) any additional information required by EPA.)

[107] 28 C.F.R. 42.404(a).

[108] See *Shannon v. HUD*, 436 F.2d 809, 821 (3d Cir. 1970)(Title VI discriminatory effects standard requires consideration of the racial and socio-economic composition of the surrounding area); See *Caulfield v. Board of Education of New York City*, 583 F.2d 605, 610-612 (2d Cir. 1978)(collecting racial and ethnic data to evaluate compliance with civil rights does not violate Title VI).

Therefore, we urge EPA to continue to honor the distinction that mere compliance with applicable environmental regulations is not sufficient to demonstrate compliance with Title VI.

Despite these strengths, several issues concerning the adverse disparate impact analysis set forth in the Guidance are problematic. Most importantly, the standard limiting impacts to those "within a recipient's authority to consider" lacks any support in law. In fact, this is a dangerous limitation on Title VI enforcement generally and a recipient's civil rights obligations in particular, which is mirrored no where in Title VI precedent. Additionally, the methodology for assessing whether an adverse impact has occurred and whether that impact is discriminatory is also flawed. EPA's policy choices in these areas whether in the ways in which adversity and disparity are measured, or in the narrow range of impacts considered, disregard the important civil rights concerns of affected communities of color.

Therefore, we propose several changes to the Guidance that build on its strengths and address its weaknesses. Our proposed changes are not just as a matter of policy, but a matter of civil rights law. Under Title VI, EPA has an obligation to ensure that none of its aid recipients discriminate on the basis of race, color, or national origin. This obligation is absolute. It cannot legally be subordinated to the types of concerns–convenience, limitations of expertise or data, concern for industry or other regulated entities–that influence the development and implementation of environmental law.

1. IMPACT ASSESSMENT

a. Title VI is not Limited to Impacts Within a Recipient Authority

OCR should abandon the rule that only those impacts that fall within the recipient's "authority to consider" are relevant to a Title VI investigation.

The Guidance strictly narrows the impacts cognizable under Title VI to only those impacts which are "*within the recipient's authority to consider*, as defined by applicable laws and regulations."[109] When describing which "applicable laws and regulations" will grant this authority, it points to "permit programs" or "broader, cross-cutting matters, such as state environmental policy acts."[110] This limitation is too narrow for proper Title VI enforcement.

The scope of impacts that OCR is willing to consider should not depend on whether the aid recipient has "authority to consider" such impacts under relevant environmental law and regulation.[111]

---

[109]Investigation Guidance p. 79 (emphasis added).

[110]Investigation Guidance p. 79.

[111]Investigation Guidance at 79.

The authority, and the obligation, to consider a full range of potentially adverse disparate impacts derives from Title VI, which binds federal aid recipients independent of their other responsibilities under state and federal environmental law.[112]

Title VI's mandate is not only independent, it is broad.[113] It may be true that the law allows a permitting agency's exclusive consideration of environmental factors under environmental law, but under Title VI such limited consideration is prohibited.[114] Thus, Title VI provides recipient environmental agencies with both the authority and obligation to consider all the impacts of their decisions that are adverse, not just environmental.

Furthermore, an agency's lack of a specific statutory mandate to consider certain types of impacts should not be confused with a lack of authority to do so. As the EPA Administrative Board has held with respect to EPA regional permitting, "to hold that a Region must abstain from a particular type of inquiry simply because a procedure is not mandated by rule would attack the core of the permitting process."[115]

Some state representatives have commented that it is unfair to recipients to hold them responsible for actions that fall outside their regulatory authority. This response is properly understood as bearing only on the issue of which sources of pollution (regulated and unregulated) may be included in a cumulative impact analysis, and not on the issue of which *impacts* of permit issuance are relevant.[116] Any state agency that has the authority to issue permits, and has accepted federal funds

---

[112]The applicable federal environmental laws may, nevertheless, demonstrate that social and economic impacts are within state permitting agencies' authority to consider; state agencies that assume permitting responsibility under Section 502 of the Clean Air Act, 42 U.S.C. 7661(a)(d), assume also the CAA-imposed responsibility to consider such types of impacts. *See infra* notes 145 and 146.

[113] U.S. Commission on Civil Rights, p.12("Title VI is, thus, the broadest instrument available for the nationwide elimination of invidious discrimination and the effects of discrimination on the basis of race or national origin.")

[114]*Shannon v. HUD*, 436 F.2d 809, 819 (3rd. Cir. 1970)(holding that HUD violated Title VI in approving a decision that concentrated on land use factors and made no investigation or determination of the social factors involved in the choice; stating that even if "exclusive concentration on land use factors may originally be permitted under the Housing Act of 1949, since 1964 such limited consideration has been prohibited").

[115]*In re Ash Grove Cement Co.*, 1997 WL 732000 at *11. *See also* Richard Lazarus and Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617, 672 (1999) (discussing Ash Grove).

[116]The former question, about which sources of pollution are relevant, is not the focus of these Comments. We believe that OCR has properly resolved this issue by stating that it will consider the contributions of unregulated sources to cumulative risk. This approach does not hold recipients responsible for impacts beyond their control; rather, it simply recognizes that the activities they do control (i.e., the issuance of the contested permit) do not take place in a vacuum, but against a backdrop of pre-existing exposures that must be taken into

conditioned on Title VI compliance, has the authority, and in fact the obligation, to consider all the discriminatory impacts that may result from such issuance. Any limitation on that obligation has neither a basis in statute nor precedent, and is contrary to the agency's constitutional obligations under the Fourteenth Amendment, the Supremacy Clause, and its obligations to comply with federal law without state imposed limits.

i. Statutory Language Does Not Limit Title VI's Impact Analysis to Impacts Within a Recipient's Authority

Title VI's statutory language is not limited to impacts cognizable under a recipient's authority. Contrary to Title VII, which explicitly limits the scope of inquiries to discrimination in hiring, promotion, or terms and conditions of employment, Title VI contains no analogous limitation–simply prohibiting all racial discrimination by recipients of federal funds. If Congress had intended to limit the scope of Title VI to certain types of actions or impacts, it would have explicitly done so as it did in Title VII. Furthermore, even Title VII's much more limiting language as to the range of cognizable impacts has been given an expansive interpretation by the courts.[117]

Title VI's broad statutory language has also been reinforced since its enactment. Congress resolved any doubts about Title VI's scope during its first two decades, when in 1988, it issued a clear statutory mandate for a broad interpretation of the types of discrimination and discriminatory impacts covered by Title VI. The Civil Rights Restoration Act of 1988[118] legislatively overruled a Supreme Court case that had held that Title VI only covered discrimination in the particular activities for which federal funding was earmarked.[119] The CRRA redefined the term "program or activity" in Title VI to include "all of the operations" of departments, agencies, or other institutions "any part of which" receives federal funds. The sole statutory exception was employment discrimination (except in cases where federal funds are earmarked for employment), to avoid overlap with Title VII. Given this, it is clear that EPA is obligated to terminate federal funding of any institution that discriminates in any of its activities except employment.

Although the issue the CRRA addressed most directly was the range of activities covered by Title VI, not the range of impacts, one consequence of the law is that Title VI reaches *types* of discrimination whose *impacts* may be removed from the institutional mission of the federal agency.

---

account before such activities can be considered safe or nondiscriminatory. After all, an adverse impact will not be found unless the permit in question would exacerbate the pre-existing risks.

[117] *See Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied 406 U.S. 95 (1972) (interpreting employer's racial discrimination in providing services to its customers as being part of the terms or conditions of employment, because it contributes to a hostile environment for minority employees).

[118] 42 U.S.C. § 2000d-4a.

[119] *Grove City College v. Bell*, 465 U.S. 555 (1984) (holding that covered "program or activity" of a university meant only the federally funded financial aid program).

Where the range of activities covered is so broad, it is impossible to sharply, and arbitrarily, limit the types of impacts considered. It is clear that to do so would functionally moot the CRRA. In fact, expanding the range of impacts considered in investigations of discrimination in environmental permitting would actually be a much less expansive interpretation of Title VI than the CRRA requires. The CRRA does not mandate a strong nexus between a recipients institutional mission and the alleged discrimination. It is surprising, then, and legally untenable, that even in cases where the discrimination is essentially environmental in nature based on environmental laws (a nexus not required by law), the Guidance requires an even closer nexus by including only environmental impacts based on environmental benchmarks.

ii. Judicial Precedent Does Not Limit Title VI's Impact Analysis to Impacts Within a Recipient's Authority

Under civil rights law, all potentially adverse impacts on populations of color are relevant to the issue of whether disparate impact exists. A wide range of cases demonstrate this principle. In *R.I.S.E. v. Kay*, for example, an environmental justice case under the Equal Protection Clause, the court held that the state landfill siting process had a disparate impact on a community of color on the basis of noise, dust, odor, property values, interference with worship, need for road improvements, and damage to a historic church and community.[120] The court held that this was insufficient to prove a constitutional violation because there was no proof of discriminatory intent, but since EPA's Title VI regulations have no intent requirement, this ultimate holding is irrelevant for our purposes. Similarly, in *Laramore v. Illinois Sports Facilities Authority*, the court held that increased noise and light, higher rent and taxes, reduced employment base, and isolation from neighboring communities were legally cognizable impacts of the construction of a facility.[121] The court dismissed the Title VI portion of the claim because the defendants were not recipients of federal funds, but refused to dismiss the plaintiffs' Equal Protection claim.[122]

In the Title VI context, the types of impacts considered by courts have not been limited to those impacts that are the subject of the general regulatory or institutional mission of either the federal agency or the recipient.[123] For example, in *Allen v. Wright*, a case challenging the IRS's granting of

---

[120]768 F. Supp. 1144 (E.D. Va. 1991), *aff'd without opinion,* 977 F.2d 573 (4th Cir. 1992).

[121]722 F.Supp. 443 (N.D. Ill. 1989).

[122]Disparate impacts were relevant to the Equal Protection claim in this case, as in many, because they had the potential to provide indirect evidence of discriminatory intent. In Title VI cases, of course, disparate impacts are relevant regardless of whether there are allegations of discriminatory intent.

[123]In *Allen v. Wright*, 468 U.S. 737 (1984), a case challenging the IRS's granting of tax-exempt status to racially discriminatory schools, the Supreme Court held that the psychological stigma experienced by victims of racial discrimination was an injury cognizable under Title VI. Preventing stigma is not, presumably, a core institutional mission of either the IRS or the beneficiaries of the tax exemption. It is–like the social and economic impacts of a permit issuance–simply an adverse impact that results from the challenged activity.

tax-exempt status to racially discriminatory schools, the Supreme Court held that the psychological stigma experienced by victims of racial discrimination was an injury cognizable under Title VI.[124] Preventing stigma is not, presumably, a defined potentially adverse impact within the core institutional mission of either the IRS or the beneficiaries of the tax exemption. It is–like the social and economic impacts of a permit issuance–simply an adverse impact that results from the challenged activity. Furthermore, EPA's implementing regulations do not limit the applicable scope of an inquiry to environmental or health impacts; there is no reason the Guidance should do so.[125]

iii. The Supremacy Clause and Federal Civil Rights Policy Does Not Limit Title VI's Impact Analysis to Impacts Within a Recipient's Authority

The "authority to consider" standard not only lacks any legal foundation, it also promotes several indefensible consequences. This standard creates a situation wherein the states themselves can define, through means of their own laws, the limits of their own obligations under federal civil rights law. That is, states could narrow their own Title VI duties by passing laws or regulations that limit the authority of the state permitting agencies to consider certain types of impacts. From a legal perspective, this is indefensible.

Title VI and EPA's implementing regulations impose an absolute obligation on all federal aid recipients, which cannot be subordinated to state law. Federal law, of course, enjoys supremacy over state law under the U.S. Constitution.[126] The U.S. Supreme Court has upheld this principle in numerous cases. See *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 594-96 (1979), *modified on other grounds sub nom. Washington v. United States*, 444 U.S. 816 (1979); *Milliken v. Bradley*, 433 U.S. 267, 280-281 (1974); *North Carolina Board of Education v. Swann*, 402 U.S. 43, 45 (1971). Most recently, the Court reinforced this principle when holding that the application of the Supremacy Clause "does not depend on express congressional recognition that federal and state law may conflict."[127] It is therefore unlawful for EPA to decline from enforcing federal law because "state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."[128]

---

[124]468 U.S. 737 (1984).

[125]See 40 C.F.R. Ch. I § 7.35(b) and (c) (1992) (prohibiting actions that have the effect of "subjecting individuals to discrimination," without specifying types of effects).

[126]U.S. Const. Art. 6, cl.2.

[127]*Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2302 (2000)(holding that a federal law will override a state law if the purpose of the federal law cannot be accomplished due to the state law)

[128]Id. at 2293-4.

When a state agency specifically argued that it did not have power under state law to carry out a federal obligation to effectuate federal law, the Supreme Court held:

> State-law prohibition against compliance with [federal obligation] cannot survive the command of the Supremacy Clause of the United States Constitution. [citations omitted]. It is also clear that [the state agency], as parties to this litigation, may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so. [citations omitted];. . . . The federal court unquestionably has the power to enter the various orders that state official and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court. [citations omitted].

Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. at 594-96.

Additionally, in *North Carolina State Board of Education v. Swann*, the Court held that states could not shield themselves, or those agencies under their authority, from the obligation to comply with federal civil rights obligations by passing laws that take away those agencies' authority to take the steps necessary for compliance.[129]

There is a strong policy justification, in addition to legal justification, why the Court has so firmly enforced this principle. In the years after *Brown v. Board of Education* and, later, the Civil Rights Act of 1964, many states openly or covertly resisted the enforcement of federal civil rights laws. Often, they did this by changing their own laws to limit the authority of subordinate agencies–like school boards, zoning boards, or housing authorities–to implement federal civil rights guarantees. The Supreme Court's unequivocal rejection of these tactics is not only binding law for EPA today; it is also good policy. Without strong civil rights enforcement, it is not unlikely that some states may attempt to take advantage of the legal loophole created by the "authority to consider" standard in carrying out Title VI compliance. Nonetheless, it seems ironic to allow a recipient to avoid federal law while operating a program funded by federal assistance for the purpose of upholding a state imposed limitation such as the "authority to consider" rule.

Thus, the "authority to consider" rule creates a perverse incentive for states that is directly at odds with one of OCR's major stated goals in issuing the Guidance. OCR has, commendably, endeavored to encourage states to address civil rights concerns in the permitting process before Title VI violations arise. But the "authority to consider" rule creates a direct and large disincentive to

---

[129] 402 U.S. 43, 45 (1971) (in school desegregation case, striking down state anti-busing statute). The Court stated that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." Title VI was adopted as an enforcement mechanism of these same constitutional guarantees and, in any event, the Court's holding in *Swann* is equally applicable to state policies conflicting with federal civil rights statutes.

recipients to undertake their own, proactive disparate impact inquiries. That is, the more narrowly circumscribed the range of factors that the state agency is allowed to consider in issuing permits, the less exposed the agency is to Title VI investigations. So, in an effort to avoid federal oversight, state agencies or legislatures have an incentive to pass laws or regulations preventing the agency from considering factors such as socioeconomic impacts or even some types of environmental impacts when issuing permits. The rule thus punishes states that pass laws that require permitting agencies to consider a wide range of relevant civil rights concerns, and rewards those that deliberately hamstring their permitting agencies' Title VI compliance efforts.

iv. Uniform Civil Rights Policy Does Not Limit Title VI's Impact Analysis to Impacts Within a Recipient's Authority

Another legal obstacle undermining the "authority to consider" rule is its inconsistent application of civil rights law. That inconsistency stems from the significant variation in the range of legal authority possessed by different recipients. At least 15 states have laws mandating, or at least allowing, permitting agencies to take socioeconomic impacts into account.[130] Many others limit consideration to those socioeconomic effects that stem directly from already-cognizable physical effects.[131] Others limit their consideration to environmental or health effects.[132] Thus, the degree of

---

[130]*See, e.g.*, ALA. CODE. ANN. § 22-30-5.1(d) (1997) (requiring consideration of "social and economic impacts . . . including changes in property values, community perception and other costs); CONN. GEN. STAT. ANN. § 22a-122(b) (1998) (requiring consideration of "public health, safety, and welfare," including economic impacts, for issuance of hazardous waste permits); IND. CODE ANN. § 13-22-10-18(a) (1998) (requiring consideration of social impacts including population density and scenic, historic, cultural, and recreational concerns); IOWA CODE § 455B.448(1) (1997) (requiring consideration of social and economic risks); KY. REV. STAT. ANN. § 224.46-830(2)(a) (1996) (same, including "property values, community perception and other psychic costs); MICH. COMP. LAWS ANN. §324.11120 (requiring consideration of scenic, historical, cultural, and recreational concerns); MISS. CODE ANN. § 17-18-15 (1997) (requiring consideration of socioeconomic factors including impact on land use, property values, and government services); MINN. STAT. ANN. § 115A.20 (same); NEV. ADMIN. CODE §444.8458 (1998) (requiring consideration of public welfare); N.J. ADMIN. CODE § 7:26G-12.2(g)(3)(ii)(4) (1998) (requiring permit applicant to submit detailed analysis of economic effects); N.Y. ENVTL. CONSERV. LAW (interpreting "environment," for purpose of triggering an EIS, to include, e.g., noise, historic and aesthetic values, and neighborhood character); S.D. CODIFIED LAWS § 34A-9-1 (same); TENN. ENVTL. HEALTH & SAFETY REGS. § 1200-1-14-.03(3)(q) (1997) (requiring permit applicant to submit detailed analysis of economic effects). *See also* Sheila Foster, *Impact Assessment*, in THE LAW OF ENVIRONMENTAL JUSTICE 256, 285-289 (Michael B. Gerrard, ed.) (ABA publication) (1999) (discussing these and other state laws).

[131]*See, e.g.*, CAL. PUB. RES. CODE § 21100(d), § 15064(f) (deeming socioeconomic impacts relevant to the significance of an environmental impact, although not enough standing alone to trigger an EIS); MONT. ENVTL. & HEALTH SAFETY REGS. § 17.4.603(12) (same).

[132]For example, Mississippi limits the regulatory authority of its environmental department to "scientific," environmental impacts and also requires deference to the interests of industry. See Miss. Laws ch. 598, § 1 (1994) (stating that "environmental rules and regulations should have an identifiable scientific basis and should be adopted after consideration of the costs to the regulated community"). *See also Save Downtown Committee, Inc. v. Wisconsin Dep't of Natural Resources*, 340 N.W.2d 722 (Wisc. 1983) (socioeconomic impacts need not be considered). Consideration of socioeconomic impacts may occur pursuant to state "mini-

civil rights protection offered by Title VI would, under this rule, vary from state to state, creating a unequal pattern of federal civil rights enforcement. Actions that are illegal in one state would, as a matter of federal law, be legal in another. Federal civil rights laws, however, impose uniform obligations that must be enforced uniformly.[133]

v. OCR's Role Does Not Support Limiting Title VI's Impact Analysis to Impacts Within a Recipient's Authority

Another drawback of the "authority to consider" rule is that it forces OCR into making legal determinations about the meaning and scope of state laws. This is something that even federal judges generally avoid doing, since America's system of federalism charges state courts as the ultimate arbiters of the interpretation of state laws. Thus, if there are open questions of state law, a federal court–even the U.S. Supreme Court–will generally refer the case to a state supreme court to resolve the legal issues. OCR, as a division of a federal agency, is certainly not trained, nor does it have the authority, to handle these interpretive questions. Furthermore, unlike federal courts, it cannot refer questions of state law to a state court for resolution. Therefore, OCR should simply avoid the business of interpreting state law, and instead enforce federal civil rights laws as intended: uniformly.

b. Universe of Sources

The relevant "universe of sources" should include the full range of sources resulting in potential adverse disparate impacts on communities of color.

The "universe of sources" of adverse disparate impacts must include all potential sources. What is a potential source should be a case-specific determination, including the proper assessment of cumulative impacts. In describing the universe, the Guidance first lists three options, which we read as illustrative rather than exhaustive. It is important nevertheless that OCR recognizes these illustrations, which demonstrate that both a "single permitted entity alone" and "regulated and unregulated sources together" can cause an adverse disparate impact. Despite these examples, the Guidance describes the universe to include only "other relevant and/or nearby sources of similar stressors."[134] With this description, the universe, although first described in broad and flexible terms, may ultimately be interpreted as only including "similar" and "relevant" sources. This section

---

NEPAs," which require environmental impact statements but do not necessarily impose substantive siting requirements, or to the laws directly governing the siting process. Thirty-four states have not passed mini-NEPAs, and some mini-NEPAs address only environmental impacts. *See, e.g.*, D.C. Code Ann. § 6-982(3); Ga. Code Ann. § 12-16-3; Mass. Gen. Laws Ann. § 61. Most of the other states not listed above in footnote 130 do not have siting laws that specifically address socioeconomic impacts. *See* Foster, *supra* note 130.

[134]Investigation Guidance p. 80.

therefore could be improved with further clarification of terms used to describe the sources within a universe.

B. ADVERSITY ASSESSMENT

1. Health Based Standards in the Adversity Assessment

OCR's adversity assessment should not be limited to consideration of health impacts, but should incorporate the full range of impacts, socioeconomic and otherwise, that result from environmental decision-making.

The Guidance focuses entirely on assessing the harms to human health–as measured in terms of increased disease risk, or in terms of health-based regulatory benchmarks–of exposure to various toxins. Although these risks relate to civil rights concerns in the environmental context, they are far from being the whole story. The siting of a polluting facility, or of any locally undesirable land use, has a range of potentially adverse impacts on the surrounding community beyond scientifically provable health risks. Property values almost invariably decline. Quality of life is severely affected by nuisance impacts such as odor, noise, or aesthetic harms. Life in the community may be physically disrupted by displacement of homes, new roads, or excess traffic. Local culture may be affected, particularly in the case of Native American communities whose religious practices or traditional hunting and fishing locations may be disturbed.[135]

All of these impacts are potentially adverse, cognizable under Title VI and EPA's implementing regulations, and therefore within OCR's legal duty to consider. OCR's obligations in this regard can be distinguished from the responsibilities of other EPA offices in implementing environmental laws. For example, the EPA Administrative Board has held that because EPA's primary mission is to protect environmental and human health, not to address socioeconomic concerns, EPA should grant permits complying with environmental standards.[136] However, EPA's implementation of environmental laws with respect to its own permitting authority is distinguishable from OCR's implementation of Title VI with respect to the permitting activities and civil rights responsibilities of federal aid recipients. As the Guidance aptly states, Title VI concerns are not commensurable with those of environmental laws.

---

[135] *See* Catherine O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3, 5-6, 9 (2000).

[136] *See In re Chemical Waste Management*, 1995 WL 395962 (EPA June 19, 1995) (holding that RCRA permit must be granted if statutory and regulatory risk and exposure thresholds are complied with); *In re Envotech, L.P.*, 1996 WL 66307 (EPA Feb. 15, 1996) (holding that Safe Drinking Water Act permits may not be denied on the basis that too many undesirable land uses already existed in an area). Note that these cases concerned EPA's authority to consider race when granting permits itself, an activity which EPA contends are not covered by Title VI on the basis of its assertion that Title VI applies only to recipients of federal assistance, not federal agencies themselves.

a. Environmental Laws Permit Consideration of Potentially Adverse Impacts beyond Environmental Health Based Standards in an Adversity Assessment

The Guidance sets up a false dichotomy between environmental and other impacts. Environmental laws often explicitly encompass a wide variety of impacts relevant to the lives of citizens. In fact, a number of environmental statutes and regulations require EPA and state permitting agencies to take social impacts into account in some way. For example, the Clean Air Act (CAA) states that prior to the redesignation of a nonattainment area, an impact assessment must be prepared that encompasses "health, environmental, economic, social, and energy effects."[137] Similarly, in order for a permit to be issued under the CAA, an analysis of alternatives must demonstrate that the benefits of the chosen site "significantly outweigh the environmental and social costs."[138] Additionally, the CAA provides two types of national ambient air quality standards: the primary NAAQS, which "protect the public health" and the secondary NAAQS, which "protect the *public welfare*."[139]

Under the Toxic Substances Control Act (TSCA), Congress instructed the EPA administrator to take into account the "environmental, economic, and social impact" of her decisions.[140] The National Environmental Policy Act (NEPA) requires that socioeconomic, aesthetic, and cultural impacts be included in environmental impact statements. Other agencies have held that, under President Clinton's Executive Order 12,898, NEPA must be interpreted to require disparate socioeconomic impact assessments. Finally, although EPA has traditionally weighed only quantifiable types of harm, President Clinton's Executive Order 12,866, which covers all risk assessments conducted by federal agencies for regulatory purposes, requires that in addition to quantifiable measures, risk assessments must incorporate "qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider."[141]

EPA nevertheless refrained from using federal environmental laws to reach beyond health based standards in its Title VI investigations. For example, EPA states it will use the primary NAAQS as a presumption of no adversity in the Guidance. The primary NAAQS, however, are designed to protect only the public health, not the public welfare. Conversely, the secondary NAAQS were

---

[137] 42 U.S.C. 7474(b)(1)(A) (1994).

[138] 42 U.S.C. 7503(a)(5).

[139] 42 U.S.C. 7408(b)(1)-(2).

[140] 15 U.S.C. 2601(c) (1994).

[141] 3 C.F.R. 638-39 (1994), *reprinted in* 5 U.S.C.A. 601 (West Supp. 1995). *See also* Robert Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, U. ILL. L. REV. 103, 111 (discussing application of E.O. 12, 866 to EPA risk assessment).

intended to protect the public welfare and therefore clearly provide a more appropriate standard for adversity in the civil rights context. Such standard, even if not promulgated, demonstrates that protecting the public welfare goes beyond health benchmarks to include factors more relevant to civil rights enforcement. Furthermore, given this presumption, EPA's statement that compliance with environmental law is not *per se* compliance with Title VI is essentially untrue. EPA's presumption has, in fact, essentially made compliance with environmental law *per se* compliance with Title VI, so long as the complaint involves air quality. Strictly under environmental law, a permit would not be granted if it did not comply with the primary NAAQS. Therefore, when a permit is issued and then challenged under Title VI that permit is, by its issuance alone, already presumptively protective. Overcoming this presumption would be hard to accomplish. Thus, when taken to its extreme, EPA's presumption illustrates how EPA has made compliance with environmental law equal to compliance with Title VI.

b. EPA Precedent Demonstrates The Inadequacy of Solely Considering Potentially Adverse Impacts Based Upon Environmental Health Based Standards in an Adversity Assessment

EPA cannot rely solely on health based standards to measure adversity. This problem was explicitly illustrated in *Select Steel*. In that case, EPA stated it would measure diversity strictly against environmental benchmarks, however, benchmarks were not available for all of the pollutants considered in the Title VI investigation. Instead of considering alternative standards, EPA simply assumed there was no adversity.[142] Health based standards, therefore, cannot be the sole basis for measuring adversity, particularly when that means an absence of a standard would mean an absence of adversity. Adversity must be considered against proper measurements to ensure adequate Title VI enforcement.

c. Health Based Standards Should Accurately Measure the Full Range of Potentially Adverse Heath Impacts in an Adversity Assessment

i. Cumulative Exposures

The assessment of cumulative exposures should explicitly incorporate synergies between multiple chemicals, not merely additive impacts of exposures to one or many chemicals from multiple sources.

[142] *Select Steel Complaint*, EPA File No. 5R-98-R5, at 5 (Oct. 30, 1998)("No performance specifications for continuous emissions monitoring systems have been promulgated by EPA to monitor dioxins. Without a proven monitor, MDEQ was unable to impose a monitoring requirement on the source. Therefore, EPA finds no discriminatory effect.")

The Guidance's focus on cumulative impacts is commendable, as disparate impact cannot meaningfully be addressed through a focus on single chemicals or single exposures. We believe that the Guidance should, however, be more clear about what sorts of cumulative impacts will be addressed. At its most simple level, a cumulative impact assessment might simply mean adding the different exposures to a single chemical faced by a population rather than analyzing only one pollution source. Such an approach would not take into account even the additive health risks of exposure to multiple chemicals, and thus would be thoroughly incapable of addressing the real level of health risk faced by communities who are overburdened with a variety of toxins. We do not believe that OCR intends to limit itself to this interpretation of "cumulative impact," as evidenced by its discussion of the "toxicity-weighted emissions" approach and its references to "multiple chemicals" in, for example, the definition of "hazard index," but it would be useful if the Guidance clarified that cumulative impact assessments should *always* include the effects of multiple chemicals.

A second approach–which we read the Guidance as endorsing–would calculate the impacts of multiple chemicals by adding the individual risks posed by multiple chemicals and/or multiple sources. This approach is encapsulated by the Guidance's definition of "hazard index." While an improvement over the single-chemical approach, the additive approach nevertheless does not adequately protect against the true risks posed by combinations of multiple chemicals. This is because chemicals in the environment, or in the human body, sometimes react synergistically with one another, such that their combined effect is far more severe than the sum of the two individual impacts.[143] For example, some combinations of pesticides may cause endocrine disruption at rates up to 1,600 times that caused by the individual pesticides alone.[144] Similarly, the potency of the carcinogens benzo(a)pyrene and benzo(a)anthrocene increases "one-thousand-fold in the presence of n-dodecane, a noncarcinogen."[145] Scientists estimate that the additive theory may be accurate for approximately 95% of pollutants. The 5% that it fails to describe accurately may seem like a small percentage, but "because there are so many chemicals, the synergistic possibilities are huge."[146] Individuals may be exposed to hundreds of pollutants at once, making the chance of synergy among some of them enormous.

---

[143]It is also possible for chemicals to react negatively to one another; that is, the presence of one may negate the effect of the other. In such cases, the additive approach would overstate the true degree of risk. However, this is not of much concern to us here, for obvious reasons. It should be cold comfort that a method of calculating risk provides unnecessarily restrictive results in some cases when it produces dramatically underprotective ones in others. Protecting against all risks, not underprotecting some and overprotecting others, should be the goal of environmental law, and error should be on the side of caution.

[144]*See* Collin & Collin at 55 (citing Steve Arnold, *Synergistic Activation of Estrogen Receptor with Combinations of Environmental Chemicals*, 272 SCIENCE 1489 (1996)).

[145]Kuehn, *supra* note 14, at 120 (citing R. Michael M'Gonigel, Taking Uncertainty Seriously, 32 Osgoode Hall L.J. 99, 110 (1994)).

[146]*Id.*

Some chemical synergies have already been studied, and in such cases there is no excuse for not considering them in an impact assessment. OCR should thus adopt a third approach to cumulative risk assessment, incorporating chemical synergies wherever data is available. This approach has been adopted in some environmental laws.[147] Furthermore, as unanimously endorsed by the range of stakeholders on the Title VI Implementation Advisory Committee, EPA should conduct, and should encourage states to conduct, further research into chemical synergies.[148] Such programs could draw on existing state and local initiatives such as the Multiple Air Toxics Exposure Study of the South Coast Air Quality Management District.[149] We recognize that the task of investigating all possible chemical synergies is unreasonable, although investigating the synergistic effects of some of the most common combinations of chemicals would be useful. However, it is not reasonable simply to ignore the existence of chemical synergies and pretend that the additive approach is accurate. The shortage of information in this area is one reason, among many, for adopting a precautionary principle, (as discussed below). It is also a reason to consider the siting of a polluting facility as an adverse impact for the purpose of proceeding to disparity analysis.

ii. Uncertainty

OCR should endorse a "precautionary principle" with respect to unknown risks.

Communities of color should not be disproportionately exposed to substances which may be harmful, even if the degree to which they are harmful is uncertain.[150] Racially disparate patterns in distributing unknown risks essentially force people of color to bear not only disproportionate but uncertain risks. The U.S. government has for the most part chosen not to regulate the emission of pollutants that do not have known and demonstrated deleterious effects.[151] We can criticize that decision, but it is at least in theory a choice by a democratic electorate to take certain risks in exchange for the benefits of industrialization. But a basic principle of nondiscrimination is that risks that society chooses to undertake should be borne across society, not targeted against certain racial

---

[147] The TSCA requires EPA to consider "cumulative or synergistic effects." 15 U.S.C. 2603(b)(2)(A).

[148] *See Report of the Title VI Implementation Advisory Committee: Next Steps for EPA, State, and Local Environmental Justice Programs*, 12-13, 20 (March 1, 1999).

[149] *See id* at 21.

[150] The problem of unknown consequences is widespread. "Of the more than 70,000 chemicals in commercial use, no information on toxic effects is available on seventy-nine percent, less than one-fifth have been tested for acute toxic effects, and less than one-tenth for chronic, reproductive, or mutagenic effects." Kuehn, *supra* note 14, at 144.

[151] *Id.* at 145-148 (describing "regulatory paralysis" in the absence of conclusive data). The policy of not regulating chemicals about which little is known has been found to deter the development of information on risk, since chemical producers have an incentive to avoid regulation. *Id.* at 154 (citing Elizabeth Anderson et al., *Key Issues in Carcinogenic Risk Assessment Guidelines*, 13 RISK ANALYSIS 379, 381 (1993)).

groups. Thus, although EPA may not have incorporated the precautionary principle into its general regulatory scheme, it is nevertheless its civil rights obligation to adopt it with respect to assessing Title VI claims.

Uncertainty is a common, perhaps ubiquitous, problem in environmental regulation and risk assessment. This is likely to be a particular problem in the context of Title VI investigations. A report conducted for EPA by the Integrated Human Exposure Committee of the Science Advisory Board concluded that no method of adverse disparate impact analysis limited to scientific evidence would be very effective, given the inherent limitations of risk assessment and the particular difficulty imposed by the 180-day deadline for processing of Title VI complaints.[152] Because of these problems, it is essential that OCR treat uncertain risks as what, in any meaningful sense, they are: adverse impacts. There is no doubt that living with exposure to chemicals whose detrimental impacts are unknown is a harm that anybody would prefer not to face. Exposure to an unknown risk is therefore a cognizable adverse impact that should be taken into account in OCR's assessment.[153]

The precautionary principle holds that when facing uncertain yet potential risks, one should err on the side of caution. In the context of a Title VI investigation, when risks due to a chemical exposure (or to a synergistic combination of exposures) is unknown, it should be considered an "adverse impact," and OCR should proceed to the disparity assessment which would focus on the extent to which these unknown risks are unequally distributed.[154]

2. Non-Health Based Standards in the Adversity Assessment

Under Title VI, as discussed previously, the agency's statutory mandate is broad. Where the alleged discriminator is a state environmental agency that receives EPA funds, and especially where discrimination in environmental permitting is alleged, there must only be a causal connection between the agency's decision and the alleged discrimination.[155] Any discriminatory impact resulting from the issuance of an environmental permit by a recipient of EPA funds is firmly within the reach of Title VI and EPA's implementing regulations.[156]

---

[152]SAB REPORT: REVIEW OF DISPROPORTIONATE IMPACT METHODOLOGIES 1, EPA-SAB-IHEC-99-007 (Dec. 8, 1988).

[153]As discussed above in section B, *all* adverse impacts–that is, anything that's bad–are cognizable under Title VI; there is no requirement that these impacts be premised on a health risk that is scientifically proven.

[154]*Cf.* Collin & Collin, *supra* note 144, at 49 (advocating placing burden of proof on polluters to show a substance is not dangerous). At the very least, EPA should rely on qualitative approaches suggesting harm where quantitative data are not available. *See* Kuehn, *supra* note 14, at 157.

[155]*Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993).

[156]A requirement that the discriminatory activity be related to the environment (e.g. issuing a permit) would actually be a more stringent nexus requirement than is statutorily allowed under the Civil Rights Restoration

In order to consider these other impacts in the adversity assessment, OCR should assess quantitatively such issues as property value decline. It should also consider aesthetic, cultural, and other impacts, when presented or implicated, taking into account the complainant's position. It is perhaps difficult to compare these adverse impacts for the purpose of assessing disparity, but OCR's response to this difficulty should not be to avoid them. We propose, instead, that a finding that a state EPA has disproportionately issued permits for siting of locally undesirable land uses (LULUs) in communities of color should itself create a presumption that adverse disparate impact exists, regardless of whether there is a significant increase in exposure to known pollutants. The statistical analysis should be of the siting pattern itself, not just of exposures and health risks. Thus, if it is shown that a landfill has a negative effect (health, socioeconomic, etc.) on a community, and that the state has disproportionately allowed landfills (or other LULUs) to be sited in communities of color neighborhoods, OCR need not quantify the negative effect in a way that can be compared across neighborhoods. Rather, it should make a preliminary finding of adverse disparate impact and force the state agency to justify siting another such facility in a community that is already overburdened.[157]

Finally, OCR should outline, in both Guidances, a methodology for taking into account such non-health-based impacts. Many states do have laws that mandate or allow consideration of socioeconomic and other impacts.[158] Furthermore, in cases where EPA has delegated permitting authority to the state agency pursuant to, for example, the Clean Air Act, the state inherits the obligation to consider those impacts as required by federal law. Thus, OCR investigations will consider these types of impacts. OCR should, therefore, set forth a methodology for conducting such investigations, especially since a major goal of the Guidance is to clarify the process for all stakeholders and for OCR staff. The quantitative, health-based, and environmental regulation-based investigative processes outlined in the Guidance may not necessarily translate directly into a means of investigating other types of impacts. OCR staff investigating those impacts, then, may be left without direction. Furthermore, the Recipient Guidance should encourage recipients to incorporate such impacts into their own analyses, and it should lay out some examples of how one might do so. Otherwise, there is a large danger that recipients will assume, incorrectly, that the only relevant adverse impacts to assess are those on human health, and they will thus have no incentive to undertake proactive measures that could address communities' broader concerns and thus reduce the incidence of Title VI complaints.

a. Sub-Populations

Act; 42 U.S.C. §2000d-4a..

[157] *Cf.* Eileen Gauna, *Major Sources of Criteria Pollutants in Nonattainment Areas: Balancing the Considerations of Clean Air, Environmental Justice, and Industrial Development*, 3 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 379, 384 (advocating permit denial on basis of disproportionate exposure alone, independent of health or environmental impact).

[158] *See* discussion *supra* under Recommendation A.

Adverse impact assessment should account for variations in susceptibility of different demographic groups to the same levels of environmental exposure to hazards. Physical differences, socioeconomic differences such as health care access, and cultural differences such as diet should all be incorporated.

Under the Guidance, adverse impact assessment would rely, at least to some extent, on exposure and risk benchmarks set by environmental regulations.[159] These benchmarks, as well as the rest of the methodology OCR proposes for analyzing risk, start from the assumption that the "safe" exposure is equal for all persons and populations. Benchmarks based on this assumption are inappropriate for use in the analysis of Title VI complaints, because they are inaccurate in recognizing "disparate impact" that a given action might have on a particular racial group. Such benchmarks must therefore be replaced with methods of analysis that take into account individual and group-based variability.[160]

We are a diverse nation, with many differences. A litany of scientific studies have demonstrated these differences in terms of susceptibility to environmental toxins.[161] These differences can affect the degree of exposure from the amount of emissions or the level of a toxin in the environment. Cultural factors such as diet or the amount of time typically spent outdoors also have a major influence. For example, subsistence fishers (notably including numerous Native American populations) are exposed to a higher degree of water pollutants that bioaccumulate in fish.[162]

There is no question that environmental benchmarks were promulgated to protect the "average" person and therefore do not reflect the characteristics of members of a particular racial group.[163] Whatever the propriety of these environmental benchmarks for the population at large, they cannot be imposed as barriers to the acknowledgment of demonstrable differences among different racial groups

---

[159]Investigation Guidance p. 84.

[160]The Draft Investigation Guidance already mentions the issues of variable susceptibility and exposure in two places: on page 85 it refers to "adverse impacts on some subpopulations (e.g. asthmatics)" and on page 90 it alludes briefly to "subsistence fish consumption patterns." The issues must also be addressed in the Recipient Guidance so that recipients' own assessments will take them into account.

[161]*See* Kuehn, s*upra* note 14, at 123-124 (discussing higher rates of asthma and other respiratory conditions in certain communities when level of air pollution exposure increases)

[162]*See* O'Neill, *supra* note 135, at 50-51 (citing several studies showing that a number of tribes have mean fish consumption rates that are 10 times those of the average American, while some individual Native Americans consume fish at 100 times the rate of the average American).

[163]*See* Verchick at 64 (citing numerous studies showing that the benchmarks set by EPA environmental regulations do not adequately account for these differences, including EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (June 1992)); Kuehn, supra note 14, at 153.

when determining whether a particular action will, in fact, have a disparate impact on members of a particular race.[164] It is true, however, that data demonstrating these differences is scarce.[165] EPA and recipient agencies, therefore, should promote such data collection.

Thus, this methodology, and the regulatory benchmarks derived from it, should not play a significant role in OCR's investigation of Title VI complaints.[166] One of the basic principles of American civil rights law, as demonstrated by the Supreme Court's Fourteenth Amendment equal protection jurisprudence, is that populations that are not alike should not be treated alike where to do so would further inequality.[167] This principle has been recognized by Congress in requiring, for example, reasonable accommodation for persons with disabilities. It has also been applied in Occupational Safety and Health Act regulations.[168] Also, it is the underlying basis for the entire theory of disparate impact discrimination. That is, some people are situated differently from others, and therefore "neutral" practices and criteria will affect them adversely and disproportionately.[169] Thus, OCR is legally and ethically obliged to consider the differential susceptibilities and exposures of different population groups when analyzing whether they have been adversely and disparately

---

[164]*See* EPA at 18; Verchick at 65, Kuehn, *supra* note 14, at 123. (discussing studies underlying benchmarks that use a set of research subjects typically comprised exclusively of healthy, white, 70 kg male workers.) The same bias is found in published medical research. For example, a "survey of published occupational cancer epidemiologic studies found that only 2% of the studies had any analysis of the effects on nonwhite women and only 7% addressed the effects on nonwhite men." Id. (citing Sheila H. Zahm, *Inclusion of Women and Minorities in Occupational Cancer Epidemiologic Research*, 36 J. OCCUPATIONAL MED. 842, 843 (1994)).

[165]*Cf.* O'Neill, *supra* note 135, at 117 (advocating grants to subpopulations to fund quantitative studies of food consumption patterns). *See generally* Kuehn, *supra* note 14, at 130-131 (discussing community groups' lack of necessary resources to conduct risk assessments), and 163-165 (advocating technical assistance grants for community risk assessments); Title VI Implementation Advisory Committee, Next Steps for EPA, State, and Local Environmental Justice Programs, 38-39 (March 1, 1999) (discussing value of small grants and technical assistance for data gathering and analysis); *See* Collin & Collin, *supra* note 144 at 79-81 (discussing Greenport/Williamsburg neighborhood study, in which community members received funding via a court order to conduct an epidemiological study and measure pollution rates). Native American tribes have also undertaken studies to document fish consumption patterns. *See* O'Neill, *supra* note 135, at 37.

[167]*See, e.g., Michael M. v. Superior Ct. of Sonoma Cty.*, 450 U.S. 464, 469 (1981) (holding that equal protection does not require "things which are different in fact to be treated in law as though they were the same," but rather that groups who are not similarly situated should be treated accordingly).

[168]*See* 29 C.F.R. § 1910.1043(h)(2)(iii) (1995) (requiring, in cotton dust standards, adjustment of predicted pulmonary function measurements for African Americans to account for smaller average lung capacity).

[169]*See, e.g., Griggs v. Duke Power*, 401 U.S. 424 (1971) (establishing disparate impact claim under Title VII).

impacted by state permitting processes.[170] This obligation stems from OCR's own 5th Amendment equal protection responsibility, as well as its responsibilities in enforcing Title VI, a statute passed pursuant to Congress's power to enforce the 14th Amendment equal protection clause against state governments.

DISPARITY ASSESSMENT

Many of the concerns listed above, including the range of relevant impacts and the degree to which impact assessment accounts for variations in susceptibility and exposure, are also relevant to the disparity stage of the analysis. In addition, we have two further recommendations.

1. Statistical Significance

The requirements for statistical significance of disparity should be lessened, and at a minimum, OCR should not require more *than a showing of statistical significance.*

It is worrisome that the Guidance seems at times to require that a sort of "super-significance" threshold be met for a finding of disparate adverse impact. Statistical significance to two or three standard deviations is a serious burden to meet, particularly when sample sizes are low as in many cases.[171] This threshold is higher than that set by some courts, and it should be lowered.[172] Furthermore, consistent with court decisions, proof of statistical significance should not be required at all in cases where sample sizes are too low for such an analysis to be meaningful.[173] EPA should also adopt the "four-fifths rule" set by the EEOC in its Uniform Guidelines on Employment Selection Procedures, which would, applied to the environmental context, mean that if the level of exposure or

---

[170]Regulatory agencies have the authority to adjust regulatory thresholds to account for heightened risk to susceptible populations. *See Building and Constr. Trades Dept., AFL-CIO v. Brock*, 838 F.2d 1258 (D.C.Cir. 1988); see also Carl F. Cranor, *Risk Assessment, Susceptible Subpopulations, and Environmental Justice*, in THE LAW OF ENVIRONMENTAL JUSTICE, supra note __, at 307, 335.

[171]*See* Collin and Collin, *supra* note 144, at 49.

[172]In a handbook for civil rights litigators, Alan Jenkins describes current case law: "A plaintiff may be reasonably certain that a cognizable discriminatory effect exists where the proportion of her racial group that is adversely affected by the challenged action is greater than two to three standard deviations from that of the baseline population as a whole. . .. Nevertheless, as a practical matter, courts generally do not require this level of statistical sophistication in order to recognize a prima facie violation." Jenkins, *supra* note ___, at 187-88 (citing *Guardians Ass'n v. Civil Service Comm'n of City of New York*, 630 F.2d 79, 88 (2d Cir. 1980) (a Title VII case); *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F.Supp. 110, 127 (S.D. Ohio 1984); *Bryan v. Koch*, 627 F.2d 612, 617 (2d Cir. 1983); Meek v. Martinez, 724 F.Supp. 888, 899, 906 (S.D. Fla. 1989)). *See also Castaneda v. Partida*, 430 U.S. 482, 496 (holding 2-3 standard deviations *sufficient* for showing of disparity, but not stating that this threshold is *necessary*).

[173] *See Bunch v. Bullard*, 795 F.2d 384, 395 (5th Cir. 1986).

other impacts faced by the comparison population is less than 80%of the affected population, disparity would be inferred automatically; smaller differentials may also give rise to a disparity finding if they are statistically significant.[174]

Whether or not OCR chooses to maintain the significance threshold at its current level, when a disparity is significant, it should not matter whether it is "a little or a lot" over the threshold, or whether the impact is "severe" or "frequent."[175] No further balancing should be necessary in order to make a preliminary finding of discrimination and, at least, force the recipient to justify its actions and consider alternatives. To require more is to send the message that a "little" bit of racial discrimination is acceptable.

[174]*See Watson v. Ft. Worth Bank & Trust*, 487 U.S. at 995 n.3, 997 (1988) (discussing EEOC Guidelines).

[175]Investigation Guidance at 90. Another worrisome passage states that "if an exposure occurs above a benchmark level, it may not be possible to conclude from those data alone that an effect would necessarily occur." *Id.* at 83, FN 127; *see also id.* at 85 (stating that a hazard index above 1 will not always translate to an adversity finding). While it is obviously true that one can never state conclusively that an effect will occur in a given case, which is why the concepts of risk and probability are used, this is no reason that OCR should decline to say that a risk exists! Although regulatory benchmarks may be underprotective, common sense dictates an exposure or combination thereof that *exceeds* those benchmarks should always be assumed to be an adverse impact.

2. Comparison Populations

The Guidance should not impose limitations on indentfying comparison populations, which should be determined on a case-by-case basis. If multiple comparisons are conducted and any of them shows disparity, a finding of disparate adverse impact should be made. Comparison populations should not include the affected population.

The Guidance lists a number of different possible comparison populations that could be used in a disparity assessment. We agree that identifying and evaluating comparison populations should be conducted according to flexible process. Comparisons should be determined on a case-by-case basis without artificial limitations. However, the affected and non-affected population should be defined clearly and separately.

Accordingly, the most preferable comparison population, at least as a default, should be the non-affected population. The comparison population should not be inclusive of the affected population (i.e., the "general population"). The relevant comparison is not the difference between how the affected population of color is treated and how the "general population," including the same affected group, is treated, but the difference in treatment of two different groups. To include the affected population of color in the comparison population will, by definition, artificially reduce disparity, since a comparison is then being made between two groups that are, in part, the same.

Consider the following simplified hypothetical: If neighborhood A has two incinerators and B has zero incinerators, what is the disparity in the number of incinerators? Clearly, there is a disparity of two. If B is compared to the average of the "general population" A + B, however, the disparity appears to be only one. But describing the situation as "A has two incinerators, but the average neighborhood has one" does not adequately describe the situation, since there is, after all, no such "average neighborhood" with exactly one incinerator. The difference in the way A and B were treated (or the effects on them) is two, no less. In civil rights law, it is the difference in the way groups A and B are treated or affected that matters, not the difference between group A and some kind of average.

Additionally, the Guidance suggests that in a given case, two or more different comparisons may be appropriate, but it does not clarify what the outcome of the disparate impact analysis would be if the results of the two comparisons were different. Since Title VI prohibits *any* discrimination on the part of recipients, the law requires that a showing of disparity between the affected population and *any* appropriate comparison population is sufficient for a finding of disparate impact, requiring the recipient to at least provide a justification for its choice and a defense against less discriminatory alternatives.

Finally, the Guidance sets the threshold too high for an adverse disparate impact finding based on comparisons. It requires a "significant disparity" that is "clearly evident in multiple measures of

both risk or measures of adverse impact, and demographic characteristics."[176] This is not only impractical, it is unrealistic given the errors, omissions and uncertainties often associated with demographic data.[177]

WARRANTING NONCOMPLIANCE

Even if all the problems previously discussed were corrected, EPA's Title VI enforcement would almost certainly be largely ineffective without substantial revision to the Justification and Less Discriminatory Alternatives sections. We, therefore, have further recommendations.

1. Justification

A burden on a particular population should not be justified by benefits to the population at large. Economic development should not justify disparate impacts.

As the Guidance rightly recognizes, disparate impacts are not *per se* a violation of Title VI. Only "actions having an *unjustifiable* disparate impact" on populations of color constitute a violation of Title VI disparate impact regulations.[178] When describing a justifiable disparate impact, however, the Guidance focuses solely on "benefits" without accounting for burdens. This imbalance is not supported by disparate impact precedent.

A sewage treatment plant, for example, is discussed as a benefit that may justify a disparate impact. Because the plant would benefit the affected community, it could justify the burden. This could potentially be true in every case, however. Equally, the non-affected community would also receive the benefit yet without any burden. This reasoning, taken to the extreme, would continuously justify one segment of the community bearing the burden for the whole community. Justification, however, is not satisfied by such slippery slope type reasoning in the civil rights context.

---

[176]Investigation Guidance, p. 90.

[177]EPA OCR, Title VI Administrative Complaint re: Louisiana Department of Environmental Quality/ Permit for Proposed Shintech Facility, Draft Revised Demographic Information, April 1998; Bradford Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify their Siting Decisions*, 73 Tul.L.Rev. 787, 838 (Feb. 1999)(discussing the criticisms about census and pollution data used by EPA in the draft report examining the Shintech complaint); Also citing Bruce Albert, Times-Picayune, June 15, 1998, at A1; Vicki Ferstel, *Data for EPA's Shintech Decision Confusing at Best*, Advocate (Baton Rouge, La.), July 2, 1998, at 1B.

[178] *Alexander v. Choate*, 469 U.S. 287, 293 (1985) (characterizing the Court's holding in *Guardians Ass'n v. Civil Service Comm'n of New York City*, 463 U.S. 582) (emphasis added). *Cf Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F.Supp. 110, 127 (S.D. Ohio 1984) ("Defendants are not per se prohibited from locating a highway where it will have differential impacts upon minorities. Rather, Title VI prohibits taking actions with differential impacts without adequate justification.").

A burden on a particular population cannot be justified by benefits to the population at large. When conducting a disparate impact analysis, the focus is on the group of individuals directly affected by the challenged practice, not the community at large. *Betsy v. Turtle Creek Associates*, 736 F.2d 983, 986-7 (4th Cir. 1984). Title VI, like Title VII and Title VIII, protects individuals.[179] Therefore, in analyzing whether a disparate impact is justified, "burdens" on one group cannot be balanced against "benefits" to another. Instead, the analysis should remain focused on the group directly affected. That means, a sewage treatment plant cannot justify burdens placed on the racial or ethnic minority group by providing a public benefit to a larger group of people.

The Guidance also suggests that broader interests such as economic development may be an acceptable justification for the disparate impact if the benefits are "delivered directly" to the affected population and if the broader interest is "legitimate, important and integral" to the recipient's mission. We recognize that including economic factors as an impact appears to support including such factors as a justification. Economic development, however, is typically not an interest that is "integral" to the mission of an environmental protection agency, at any level, whether federal, state, local or tribal. Also, economic development could essentially be used to justify every permit decision in every case.

Justifying disparate impact on economic grounds, at a minimum, should be strictly limited. The concept of "economic benefit" as a justification must be defined with specificity to allow adequate opportunity for public comment. Without clear definition, no notice has been provided on a major point. A definition, for example, must be sufficiently detailed to answer whether the opportunity for jobs to some community residents or the stimulus for local economic development, alone or together, would justify a disparate impact.

2. Less Discriminatory Alternatives

The Guidance correctly states that if a less discriminatory alternative exists, it must be implemented. In the Title VII context, an employer may still be liable for discrimination for an employment practice that is both justified and "job-related," if there is an alternative employment practice with a lesser adverse impact that the employer refuses to adopt.[180] This duty has been recognized in case law interpreting Title VI.[181]

---

[179] 42 U.S.C. § 2000d ("No person ... shall, on the ground of race, color or national origin..."); Betsy, 736 F.2d at 987(discussing Title VII and Title VIII protection of individuals based on language prohibiting discrimination against any "person").

[180] See 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

[181] See *N.A.A.C.P. v. Medical Center, Inc*., 657 F.2d 1322, 1336-37 (3rd Cir. 1981)(a defendant may need to go "forward with evidence showing that it has chosen the least discriminatory alternative."); *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F.Supp. 110, 127 (S.D. Ohio 1984)(discussing the requirement that the action taken must be the least discriminatory alternative).

Under Title VI, a challenged practice resulting in a disparate impact will be justified only if it is the *least* discriminatory alternative.[182] In order to determine whether a challenged practice is indeed the least discriminatory, EPA must consider a wide range of alternatives. The Guidance, however, fails to discuss how EPA will conduct its alternatives analysis. It only states that less discriminatory alternatives must "cause less disparate impact than the challenged practice" and must be "practicable and comparably effective."[183] These standards are meaningless unless measured against a sufficient amount of actual alternatives.

The Guidance also discusses "less discriminatory alternatives" in terms of "cost and technical feasibility."[184] This standard is consistent with EPA's fixed reliance on technical criteria, even in the context of civil rights enforcement. Aside from the inherent limitations of such reliance, EPA should further define how cost and technical feasibility will be included within an alternatives analysis. Without that clarification, complainants will never be settled with decisions that conclude that their civil rights have been outweighed by costs or technical feasibility involving a facility.

DUE WEIGHT

The Guidance affords substantial deference to recipient's own investigations. Whether through pre-complaint agreements or post-complaint analyses, recipients receive generous incentives and presumptions in their favor. Specifically, OCR will "rely" on a recipient's submissions "in a finding that the recipient is in compliance with EPA's Title VI regulations" if such submissions are "sufficient scope, completeness, and accuracy" and/or promise pollution reductions.[185] Only if "significant deficiencies" exist or "circumstances had changed substantially" will OCR refrain from relying upon such submissions within its decisions. The Guidance coins this deferential approach under the term "due weight."

EPA nevertheless states that, even with its "due weight" approach, it will not "defer to a recipient's own assessment." That, however, is precisely what EPA does. Submitted analyses or agreements meriting "due weight" will preclude further inquiry into a complainant's allegations and grant a recipient a presumption of compliance with Title VI.

What is required to receive "due weight" further illustrates EPA's deference. Submissions must only appear sufficient because EPA's review of such submissions will not "seek to duplicate or

---

[182]Id.

[183]Investigation Guidance p. 93.

[184]Investigation Guidance p. 93.

[185]Investigation Guidance p. 72.

conduct such analyses" nor "conduct a first hand investigation of allegations."[186] Therefore - based on nothing more than a facial inspection – recipient's submissions could be relied upon to essentially shield them against all present and future Title VI complaints until another facial inspection shows that these submissions contain "significant deficiencies" or that "circumstances had changed substantially." This is inexcusable, regardless of its underlying purpose of providing Title VI compliance incentives.

"Due weight" offers EPA the ability to provide an incentive for recipients to conduct analyses/studies, enter into agreements, and submit information regarding Title VI. Incentives are indeed a positive pro-active approach to foster civil rights compliance. Incentives, however, can only encourage, not ensure, Title VI compliance and enforcement. Instead of relying on a recipient's data and analysis, EPA should verify both its sufficiency and merit. That verification cannot be done through a facial review alone, without an independent assessment and determination of Title VI compliance.

1. Analyses/ Studies

OCR should conduct its own first hand investigations of allegations to promote accurate and complete investigations that include counter-analyses. Complainants should have the opportunity to present, review and respond to submitted data.

EPA repeatedly requests submitted data to facilitate investigations. OCR expects its investigation process "to be substantially improved and expedited by information submitted by complainants and recipients."[187] Submitted analyses are requested "in response to allegations, or during the course of an investigation" from both recipients and complainants.[188] In exchange for such submissions, OCR will defer to their conclusions if they are "sufficient scope, completeness, and accuracy," and are "relevant to the Title VI concerns in the complaint."[189]

Although the Guidance provides that both recipients and complainants may submit supporting data and analysis, complainants will be less equipped to do so. Data necessary to conduct sophisticated statistical studies and computer-generated analyses will likely require resources beyond the means available to most complainants. Complainants will therefore be disadvantaged without equal access to participate. In order for this approach to be fair, it is crucial that both recipients and complainants have the resources and technical expertise to submit their own analysis and challenge

[186]Investigation Guidance p. 72-3.

[187]Investigation Guidance, p. 70.

[188]Investigation Guidance, p. 71.

[189]Investigation Guidance, p. 71.

competing data. OCR cannot assume that demographic and pollution information is accurate and complete,[190] particularly when one-sided.

As an enforcement agency, OCR must perform its investigations thoroughly. OCR therefore should conduct its own first hand investigations fully pursuing complainants' allegations. Without this support, no data or analyses outside of recipients' submissions will be produced and analyzed. Alternatively, recipient data should be made available for review by complainants. Independent data or review is imperative not only to ensure thorough investigations but also to understand the complexities of determining adverse disparate impacts. These complexities are evident in the Guidance, whether in measuring the adversity of impacts;[191] calculating cumulative exposure; defining the relevant area and affected populations;[192] determining the appropriate facilities, or the amount of disparity. All of these factors clearly involve complex scientific judgments. Therefore, the complainant, like the recipient permitting agency, should be afforded an equal opportunity to present, review and respond to data and analysis.

2. Area Specific Agreements

OCR and communities should have a role in ensuring that area-specific agreements and other settlements between recipients and complainants are enforced.

The Guidance encourages recipients to reach agreements directly with communities, in a manner that fairly addresses a broad range of community concerns, not merely those related to the specific contested permit. But given the weight that OCR intends to give to these agreements – including dismissing future complaints by new parties, it is vital that a credible monitoring and enforcement mechanism be in place to ensure that these agreements are obeyed. Otherwise these agreements could become a means for a recipient to escape its obligations under Title VI and EPA's implementing regulations.

With regard to settlements between OCR and recipients, the Guidance already states that any "settlement agreement should provide for enforcement by EPA, which may include special conditions

---

[190]See Bruce Alpert, Times-Picayune, June 15, 1998, at A1 (discussing EPA's problem with relying on questionable census data within one mile of proposed Shintech facility, and also with measuring the amount of pollution in four-mile area).

[191]Investigation Guidance p. 82-3 ("OCR intends to use all relevant information to determine whether the predicted impact is significantly adverse under Title VI." "The reliability, degree of scientific acceptance, and uncertainties of impact assessment methods varies greatly. OCR expects to weigh these uncertainties in the data and methods as part of its decision process.")

[192]Investigation Guidance p.87 ("OCR expects to use mathematical models, when possible, to estimate the location and size of affected populations," based on "environmental factors and other conditions such as wind direction, stream direction, or topography," "location of a plume or pathway of impact," or "proximity.").

on future assistance grants for failure to comply with the agreement."[193] This language is commendable. However, the Guidance should state explicitly that such enforcement would also be required for agreements negotiated directly between recipients and complainants or community members, such as area-specific agreements. Industries and states have often negotiated with community groups over the siting of facilities, promising them various benefits and protections that have ultimately failed to materialize. These failures have undermined the credibility of such negotiations to communities. Thus, a Title VI process that relies heavily on informal agreements must involve a strong and credible mechanism for ensuring that the agreements actually are implemented in a way that meets the needs of communities.[194]

Community members should play an active role in this monitoring and enforcement process to ensure its credibility and responsiveness. Communities, however, often lack the resources or the expertise to handle enforcement on their own. It is evident, therefore, that both communities and EPA must play an active role in monitoring compliance, particularly in light of the technical analysis involved in implementing environmental standards. This monitoring should be an absolute requirement for EPA to give "due weight" to area-specific agreements when considering future complaints. If future complaints are brought that allege–either directly or by implication–a failure to comply with the terms of an agreement, OCR should, naturally, not dismiss the complaint on the basis of the earlier agreement, but should thoroughly investigate that agreement's continued effectiveness.

Area-specific agreements should not necessarily bind parties to future disputes who were not involved in the original investigation and informal resolution process.

The Guidance allows area- specific agreements to have a preclusive effect on future allegations. That is, "if a later filed complaint raises allegations regarding other permitting actions by the recipient that are covered by the same area specific agreement, OCR would generally ... dismiss the allegations."[195] This effect is problematic in light of basic principles underlying our legal system.

The most appropriate legal analogy is the principle of *res judicata,* which holds that matters already litigated that have reached a final resolution, cannot be re-litigated.[196] Constitutional due process places an important limit on this principle, however. It protects the opportunity to be heard so that persons who were not parties to the original litigation cannot be precluded from bringing their

---

[193]Investigation Guidance p. 69.

[194]The recommendations of the Title VI Implementation Advisory Committee, representing a consensus of all stakeholders, propose allowing communities to "continue to assess the compliance of permitted facilities" after complaint resolution. *See Advisory Committee Report, supra* note __, at 53. "Building community capacity to monitor industry performance may prove very effective in assuaging community anxiety about the health and environmental risks posed by individual facilities." Id.

[195]Investigation Guidance, p.73.

[196]*Heiser v. Woodruff*, 327 U.S. 726, 735 (1946).

own claims.[197] The notable exception to this rule is the area of class action suits, which can bind all members of a class, even if they do not all agree to a settlement.[198] However, the class action process includes considerable procedural safeguards intended to ensure that all class members at least have their interests fairly represented. [199] For example, a class must be defined to include only persons with common and typical interests and class counsel and representatives must adequately represent the interests of the class, otherwise the judge must refuse to certify a class.[200] Similarly, class action settlements are closely scrutinized by judges to ensure that they are fair, reasonable and adequate with respect to those whose rights they affect. Although class action requisites do not directly apply here, OCR should be cautious when precluding potentially valid charges when carrying out its Title VI enforcement responsibilities.

These basic due process principles, therefore, should lend specific guidance to OCR. Some procedural safeguards should exist when enacting an approach that removes a complainant's opportunity to be heard, particularly in both the present and future, regarding civil rights allegations. This is especially true given a complainant's right to request that EPA enforce the civil rights obligations of recipients. For those reasons, OCR should reconsider the preclusive effect of area specific agreements that dismiss Title VI complaints. Alternatively, any preclusive effect afforded should be evaluated against the due process protections underlying the class action rule. For example, if the person or group bringing such a complaint was not involved in the original dispute, the original area-wide agreement, and the informal resolution process that brought it about, it should be scrutinized to ensure that, at least, any potential violations of Title VI are fairly considered and the interests of non-represented parties were fairly represented. Otherwise, persons with distinct and legitimate Title VI concerns could find their rights adversely affected by a previous process that had little or nothing to do with the issues they are facing. In addition, a particular degree of caution should be exercised when considerable time has passed since the original agreement, or when circumstances have changed in some way, so as to make the agreement less relevant to the current situation.[201] Based on these principles, OCR should incorporate at least some procedural safeguards with respect to these agreements.

---

[197] *Hansberry v. Lee*, 311 U.S. 32, 37 (1940)(holding that it would violate the Due Process Clause of the Fourteenth Amendment to bind litigants to an earlier judgment to which they were not parties and in which they were not adequately represented); *Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1996) ("opportunity to be heard is essential requisite of due process of law in judicial proceedings.")

[198] Fed.R.Civ.Pro 23(b)(2).

[199] Fed.R.Civ.Pro 23(a).

[200] Fed.R.Civ.Pro. 23(a).

[201] The Guidance recognizes this latter principle: "An exception to this general guideline would occur where there is an allegation or information revealing that circumstances had changed substantially such that the area-specific agreement is no longer adequate or that it is not being properly implemented." Investigation Guidance, p. 73.

We appreciate the opportunity to provide EPA with comments concerning its Title VI Guidance. We encourage EPA to continue to develop its Guidance and welcome the opportunity to discuss our comments further or provide additional suggestions during its finalization.

Sincerely,

Thomas J. Henderson, Esq.
Janette L. Wipper, Esq.
Sonya Starr, Law Clerk
LAWYERS COMMITTEE FOR CIVIL
RIGHTS UNDER LAW

and

Norman Chachkin, Esq.
N.A.A.C.P. LEGAL DEFENSE
& EDUCATIONAL FUND, INC.